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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CLARENCE JOSEPH STROWIG, JR.,

Defendant and Appellant.

B156793

(Super. Ct. No. BA221568)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ruffo Espinosa, Judge. Affirmed.

Kiana Sloan-Hillier, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Nora Genelin, Deputy Attorney General, for Plaintiff and Respondent.

Clarence Joseph Strowig, Jr. appeals from the judgment entered following his conviction by jury of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), with personal infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)). He was sentenced to prison for six years.

In this case, we reject appellant's related contentions that trial court reversibly erred by failing to instruct the jury with that portion of CALJIC No. 9.00 pertaining to the People's burden of proof to negate a defendant's claim of self-defense, and that appellant was denied effective assistance of counsel by his trial counsel's failure to request that instruction. We hold the trial court properly instructed the jury, using CALJIC No. 5.55, that the right of self-defense is unavailable to a person who seeks a quarrel with the intent to create a necessity of exercising that right. Finally, we reject appellant's cumulative error contention.

FACTUAL SUMMARY

1. People's Evidence.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that at about 8:00 p.m. on August 27, 2001, Stacy Robinson, an African-American, was walking north on the west side of Fairfax approaching First Street in Hollywood. There were restaurants and stores in the area, and Robinson was going to eat dinner. Appellant was walking southbound towards Robinson and on the same side of the street as Robinson. Appellant was pushing a cart containing various items.

Appellant approached to within less than 20 feet from Robinson, who was on the corner. Appellant then repeatedly said, "Nigger F.B.I. Nigger F.B.I." When appellant

said this, he was looking directly at Robinson, who was the only person on the corner. When appellant and Robinson were directly in front of each other, Robinson asked appellant what it was that appellant had said and whether he was talking to Robinson. Appellant replied in the affirmative and stated, ““You’re a nigger F.B.I. You’re a nigger F.B.I.,”” becoming aggravated as if Robinson were doing something to appellant. Robinson continued to stand where he was. The prosecutor asked what then happened, and Robinson replied, “We were in each other’s face. And he had a bag in his hand, and he started swinging at me.” The bag was in appellant’s right hand.

Robinson, using his left hand, blocked the blow. Robinson shoved appellant in the chest and appellant fell. Appellant grabbed Robinson’s leg and appellant, using his right hand and holding the bag containing the knife, twice stabbed Robinson’s right knee.

Robinson fell, and appellant and Robinson fought with appellant on top of Robinson. Appellant continued stabbing Robinson. Robinson, using his left hand, grabbed appellant’s right hand, and the knife cut the palm of Robinson’s left hand. Robinson testified that he held appellant “down with [Robinson’s] right hand with [appellant’s] head.” Robinson used his left hand to hold appellant’s right arm. Although Robinson was detaining appellant, appellant continued stabbing him, and stabbed Robinson in his forearms and other places.

Robinson called to some nearby people for help, stated that appellant had a knife, and asked for someone to call the police. Robinson was not hitting or trying to hurt appellant. Robinson later released appellant and appellant picked up his glasses from the street and walked away, taking his cart with him. Appellant did not appear to be injured. Robinson followed appellant, police arrived a short time later, and Robinson pointed out

appellant to the police. Robinson was taken to the hospital, and photographs of some of his injuries were admitted in evidence.

Paul Hadnagy testified that, at the above time and date, he observed appellant and Robinson involved in a scuffle, and Robinson was trying to keep control over appellant's right hand, which contained a bag. The two fell and continued struggling for control over appellant's right hand. Robinson was trying to hold appellant down, was repeating that appellant had a knife, and was pleading for help. Appellant later stood and looked for his glasses. Robinson stated that appellant had stabbed Robinson. Robinson looked like he had been attacked. Hadnagy testified that "[Robinson] looked like he was confused, why is this happening and what is going to happen? He had a pleading sense about him."

Appellant took his cart and began walking away. Appellant did not have difficulty walking, had no visible injuries, and did not seem to be injured. Appellant did not call for help or try to call the police. Hadnagy told appellant that Hadnagy was going to call the police, appellant heard Hadnagy, but appellant did not respond and kept walking. Robinson also told appellant that police were going to be called. Hadnagy followed appellant a short distance, the police arrived, and Hadnagy pointed out appellant to police.

Alexander Velasquez testified that he observed appellant and Robinson engaged in the above mentioned scuffle. Velasquez's testimony was similar to that of Hadnagy. Robinson and appellant were not exchanging blows, but Robinson was trying to restrain appellant. Appellant said nothing to Velasquez, but Robinson asked for help and asked if Velasquez had called the police.

A police officer testified that officers arrived and observed appellant walking. Appellant paused, looked back at them, then continued walking. Appellant did not appear to be injured and did not yell for help. After police detained appellant, he claimed he was injured. Police found the knife in the bag inside appellant's cart.

2. Defense Evidence.

In defense, appellant, a Caucasian, testified that, on the above date, he was homeless but looking in a store window while window shopping. Appellant had a cart with him and, inside the cart, personal property, including the knife in the bag. Robinson walked up to appellant and struck him in the face with Robinson's closed fist, breaking one of appellant's teeth and causing Robinson's glasses to fly off his face. Robinson, using his hands, grabbed the cart's handles. Appellant staggered, then picked up the knife. Appellant told Robinson to leave appellant alone or appellant would stab him. Robinson grabbed appellant and appellant stabbed Robinson in the hand. Robinson grabbed appellant's shirt, a struggle ensued, and Robinson grabbed the hand appellant was using to hold the knife.

Robinson pushed appellant to the ground and got on top of appellant. Appellant testified that Robinson did not "hit [appellant] that much" when Robinson was on top of him, but Robinson tried to get the knife. Appellant repeatedly told Robinson to let appellant up and that appellant wanted to go. Robinson testified that appellant "pushed [appellant's] head to the pavement." Witnesses came and started yelling, and Robinson let appellant up. Appellant was in a state of shock. Appellant testified that Robinson had attacked appellant and "wanted to take [appellant's] stuff." Appellant testified he said

“call the cops or something,” then left. Some persons might have said that they were going to call the police.

During cross-examination, appellant testified that after Robinson initially hit appellant in the face, Robinson grabbed appellant, the two struggled, and appellant grabbed the knife and tried to stab him. At some point, Robinson had grabbed the cart’s handle. Appellant later testified that after Robinson initially hit appellant in the face, Robinson grabbed the cart like he was going to take it, appellant grabbed the knife out of the bag, and appellant “[went] to stab” Robinson on the hand Robinson was using to hold the cart. At that point, appellant probably stabbed Robinson only once. However, Robinson subsequently grabbed appellant by his shirt, the two struggled, Robinson grabbed appellant’s hand, and appellant tried to stab Robinson. Robinson was pushing appellant around and, the next thing appellant knew, he was on the ground. Appellant testified he thought he stabbed Robinson about four times “but according to [Robinson], I guess it’s six or seven, because when I was on the ground, he was pushing my head down.” Robinson pounded appellant’s head on the pavement.

CONTENTIONS

Appellant contends: (1) “[t]he trial court committed prejudicial error when, in reading CALJIC No. 9.00, which defined the crime of assault for the jury, it omitted the bracketed portion stating the People’s burden of proving the application of physical force by defendant was not in lawful self-defense”; (2) “[t]rial counsel was ineffective by failing to request that the bracketed portion of CALJIC No. 9.00 be given”; (3) “[t]he trial court committed further prejudicial error by instructing the jury concerning the concept

that self-defense may not be contrived in the language of CALJIC No. 5.55”; and (4)

“[t]he jury instructional errors were cumulatively prejudicial and grounds for reversal.”

DISCUSSION

1. The Trial Court Did Not Reversibly Err By Failing To Instruct The Jury With That Portion Of CALJIC No. 9.00 Pertaining To The People’s Burden Of Proof To Negate Self-Defense, And Appellant Was Not Denied Effective Assistance Of Counsel By His Trial Counsel’s Failure To Request That Instruction.

a. Pertinent Facts.

The court gave to the jury without objection the definition of assault using CALJIC No. 9.00.¹ The court did not give, and appellant did not request that the court give, that bracketed portion of CALJIC No. 9.00 which read: “[A willful application of physical force upon the person of another is not unlawful when done in lawful [self-defense] [or] [defense of others]. The People have the burden to prove that application of physical force was not in lawful [self-defense] [defense of others]. If you have a reasonable doubt that the application of physical force was unlawful, you must find the defendant not guilty.]”²

¹ That instruction read: “[i]n order to prove an assault, each of the following elements must be proved: (1) [a] person willfully committed an act which by its nature would probably and directly result in the application of physical force on another person; and (2) [a]t the time the act was committed, the person intended to use physical force upon another person or to do an act that was substantially certain to result in the application of physical force upon another person; and (3) [a]t the time the act was committed, the person had the present ability to apply physical force to the person of another. [¶] ‘Willfully’ means that the person committing the act did so intentionally. [¶] To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether an assault was committed.”

² The court also did not instruct on the principle of “self-defense against assault” using CALJIC No. 5.30. That instruction reads: “[i]t is lawful for a person who is being assaulted to defend [himself] [herself] from attack if, as a reasonable person, [he] [she]

The court gave the jury CALJIC No. 2.01 on the sufficiency of circumstantial evidence.³ The court also gave CALJIC No. 2.90 on reasonable doubt.⁴

Moreover, the court gave the jury CALJIC Nos. 5.50 on “self-defense--assailed person need not retreat,”⁵ and 5.51 on “self-defense--actual danger not necessary.”⁶ The

has grounds for believing and does believe that bodily injury is about to be inflicted upon [him] [her]. In doing so, that person may use all force and means which [he] [she] believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.”

³ CALJIC No. 2.01 reads: “[E]ach fact which is essential to complete a set of circumstances necessary to establish the defendant’s guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.”

⁴ CALJIC No. 2.90 reads: “[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: [i]t is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.”

⁵ CALJIC No. 5.50 reads: “[a] person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of his right of self-defense a person may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and a person may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.”

⁶ CALJIC No. 5.51 reads: “[a]ctual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an actual belief and fear that he is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if that individual so confronted acts in

court also gave CALJIC No. 17.31, pertaining to the fact that all instructions are not necessarily applicable.⁷

b. *Analysis.*

Appellant claims the trial court erred by failing to give the above quoted bracketed portion of CALJIC No. 9.00. There is no need to decide whether he waived the issue by failing to raise it below, or whether the court erred by failing to give the instruction at issue.

The jury was instructed pursuant to CALJIC No. 2.90 that the People had the burden to prove a defendant's "guilt[]" beyond a reasonable doubt, and CALJIC No. 2.01 related this burden to the issue of circumstantial evidence, including, therefore, any evidence of self-defense. CALJIC No. 5.50, given under a heading of "Justification" in the written instruction, advised the jury, *inter alia*, that a person "may" use force pursuant to a "right" of self-defense. Read together, these instructions adequately advised the jury that a defendant was not guilty if there was circumstantial evidence sufficient to raise a reasonable doubt that appellant's application of force was in self-defense, and that it was the prosecution's burden to negative the claim of self-defense beyond a reasonable doubt. (Cf. *People v. Adrian* (1982) 135 Cal.App.3d 335, 341-342.) In light of this and the

self-defense upon these appearances and from that fear and actual beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent."

⁷ CALJIC No. 17.31 reads: "[t]he purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given I am expressing an opinion as to the facts."

strength of the evidence of appellant's guilt,⁸ the alleged instructional error was harmless. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Adrian*, *supra*, 135 Cal.App.3d at pp. 341-342.) Finally, in light of the other instructions given to the jury (CALJIC Nos. 2.01, 2.90, and 5.50) and the strength of the evidence of appellant's guilt, any incompetence of counsel resulting from appellant's failure to request the instruction at issue was not prejudicial, therefore, appellant was not denied effective assistance of counsel. (Cf. *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

2. The Trial Court Properly Gave CALJIC No. 5.55 To The Jury.

The court gave to the jury without objection CALJIC No. 5.55, which read: "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." Appellant claims the trial court erred by giving the instruction.

There was substantial evidence from the People's case that appellant, a Caucasian, repeatedly directed a racial epithet to Robinson, an African-American, when appellant was a short distance from him. Robinson signaled to appellant that his conduct would not go unaddressed when, directly in front of appellant, Robinson confronted him and asked him what he had said and whether he was talking to Robinson. Despite that confrontation, appellant, again, repeatedly directed the racial epithet to Robinson, this time, when the two were "in each other's face." During this time, appellant had ready access to a knife.

⁸ The jury reasonably could have concluded that appellant's claim of self-defense was fabricated.

The jury was free to accept or reject evidence from either party. Based on the People's case, appellant continued to use racial epithets towards Robinson as the distance closed between them, Robinson confronted appellant, and appellant had ready access to a knife. Even if, based on the defense case, Robinson was the initial aggressor when he struck appellant in the face, and a right of self-defense was otherwise available to appellant, the giving of CALJIC No. 5.55 was proper since, based on the above recited facts from the People's case, there was substantial evidence that, before Robinson struck appellant, appellant sought a quarrel with the intent to create a real or apparent necessity of exercising self-defense. The court did not err by giving CALJIC No. 5.55. (See *People v. Garnier* (1950) 95 Cal.App.2d 489, 496.) And, in light of the evidence of appellant's guilt, any error in giving the instruction was harmless. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381-1382.)⁹

DISPOSITION

The judgment is affirmed.

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CROSKEY, J.

We concur:

KLEIN, P.J.

KITCHING, J.

⁹ Finally, in light of our discussion in parts 1 and 2, *ante*, we reject appellant's contention that cumulative instructional error requires reversal of his conviction.